SUPREME COURT, U. S.

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No. 73-807

In the Supreme Court of the United States

OCTOBER TERM, 1973

CYLINDER GAS, CHEMICAL, ETC., EMPLOYEES LOCAL NO. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

OTTAWA SILICA COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 482 F. 2d 945. The decision and order of the National Labor Relations Board (Pet. App. A3-A34) are reported at 197 NLRB No. 53.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1973 (Pet. App. A1). The petition for a writ of certiorari was filed on November 20, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer did not violate Section 8(a)(1) and (3) of the National Labor Relations Act by locking out his employees and continuing operations with temporary replacements obtained from outside the bargaining unit, in order to further his legitimate bargaining position.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page A35 of the petition.

STATEMENT

A. The Board's Findings of Fact

Ottawa Silica Company operates a plant at Rockwood, Michigan, where it mines, processes, and distributes silica sand, primarily to customers who utilize it in the manufacture of glass (Pet. App. A26; J.A. 75-77).[1] The Company's glass customers operate their furnaces continuously seven days a week and, because storage capacity is limited, the customers require a regular, uninterrupted supply of silica sand (Pet. App. A26; J.A. 110, 121-122, 123). Indeed, the customers maintain "daily communication" with the Company regarding the progress of shipments en route (Pet. App. A26; J.A. 112-113). If a glass furnace must be taken out of production

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[1] "J.A." refers to the joint appendix to the briefs in the court of appeals.

because of a shortage of silica sand, the customer may lose production with a retail value of $35,000 per day (Pet. App. A26-A27; J.A. 125).

Since May 19, 1967, petitioner Union has been the certified bargaining representative of the Company's production and maintenance employees at the Rockwood plant (Pet. App. A23).[2] Shortly after certification, the parties entered into a collective bargaining contract which expired on May 31, 1970 (Pet. App. A23). Prior to the expiration date, Union representative Vitale notified the Company that the Union desired to open negotiations on a new contract (Pet. App. A23).

From May 15 to May 31, 1970, the parties met on at least four occasions in an effort to reach agreement on a new contract (Pet. App. A23). At the May 25 meeting, Union President Schultz stated that "the company was going to pay, and pay through the nose" and that "if there was a strike the union would strike the company everywhere it operated * * *" (Pet. App. A23; J.A. 89). At the May 29 meeting, Vitale deprecated the Company's three new economic proposals, stating: "If that's all you've got, you deserve a strike." Vitale also stated that the Union's negotiating committee "was empowered to call a strike" (Pet. App. A23; J.A. 92). The Union rejected the Company's request to extend the current agreement for a week in order to permit the Company to "operate successfully and in good faith with its customers * * *" (Pet. App. A23; J.A. 93). The Union insisted that any extension be on a day-to-day basis (Pet. App. A23; J.A. 68). At the May 31 meeting,

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[2] From 1940 to 1967 these employees had been represented by another labor organization (Pet. App. A23).

the Union representatives told the Company that they would urge the employees to reject the Company's final contract proposals (Pet. App. A24; J.A. 94, 83). At the conclusion of this bargaining session, the Company announced that the 72 bargaining unit employees would be locked out effective immediately and that they would be replaced by supervisors (Pet. App. A24; J.A. 57).

Between June 1 and June 5, the Company maintained enough production to supply silica sand to its glass customers by utilizing 23 non-unit employees, including supervisory and sales personnel, and supervisors transferred from its Ottawa, Illinois plant (Pet. App. A24, A27; J.A. 58, 80). On June 5, the Company informed the Union by telegram that the unit employees could return to work on June 7 "under the same terms and conditions of employment as existed on May 31, 1970" (Pet. App. A24; J.A. 53, 100). On June 6, the Company sent a similar telegram to each of the unit employees (Pet. App. A24; J.A. 54). On June 7, the unit employees voted to reject the Company's contract proposals and to strike (Pet. App. A24-A25; J.A. 59-60). On June 8, the Union established a picket line at the Rockwood plant. The strike continued until October 25, 1970, when the parties reached agreement on a contract and all strikers were recalled to work (Pet. App. A25; J.A. 81, 60).

B. The Decisions Below

The Board (with two Members dissenting) held that the Company's lockout and use of non-unit, temporary replacements did not violate Section 8(a)(1) and (3) of the Act, and accordingly dismissed that portion of the

complaint (Pet. App. A3-A19).[3] Two Members of the Board majority considered the Company's conduct permissible because it was neither motivated by "antiunion considerations" nor "intended to discourage the exercise of protected employee rights," and the harm resulting to employee rights was "comparatively slight" since "the replacements were expressly used for the duration of the labor dispute only" (Pet. App. A8-A9). Chairman Miller agreed that the conduct was permissible because, in the circumstances here, the Company "utilized only its own nonunit personnel in carrying on its operations during the lockout," there was "reason to believe that a strike was imminent," and there was "some evidence * * * of a *bona fide* business justification for [the Company's] actions" (Pet. App. A11).

The court of appeals sustained the Board's dismissal of the complaint. It found "substantial evidence on the whole record in the unique circumstances of this case to support the findings of fact and conclusions of law of the Board majority" (Pet. App. A1-A2).

ARGUMENT

The holding of the court below that an employer, under the circumstances here, may continue operations with temporary replacements during an otherwise lawful lockout is correct. No issue warranting review by this Court is presented.

1. In *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, this Court held that "an

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[3] The Board also dismissed another portion of the complaint and affirmed the Examiner's finding that the Company violated Section 8(a)(1), (3) and (5) of the Act by its unilateral refusal to award holiday and vacation pay to the locked-out employees (Pet. App. A3-A4). These rulings are not contested here.

employer violates neither §8(a)(1) nor §8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure in support of his legitimate bargaining position" (*id.* at 318). The Court concluded that a lockout in these circumstances was neither so destructive of employee rights nor so devoid of a significant economic justification as to constitute a violation of these sections, absent a specific showing of anti-union motivation.

While the Court intimated no view "as to the consequences which would follow had the employer replaced his employees with * * * temporary help" (*id.* at 308, n. 8), in *National Labor Relations Board* v. *Brown,* 380 U.S. 278, decided the same day, it ruled that a lockout of employees by the non-struck employers of a multi-employer bargaining association, followed by the use of temporary replacements to maintain operations, was not proscribed by Section 8(a)(1) and (3) of the Act. The Court acknowledged that "the use of temporary nonunion personnel in preference to the locked-out union members was discriminatory," but concluded on balance that "any resulting tendency to discourage union membership was comparatively remote" and that the use of temporary replacements constituted a "measure reasonably adapted to the effectuation of a legitimate business end" (*id.* at 288).

The principle reflected in *American Ship Building* and *Brown* is that the propriety of an employer's use of economic weapons to further a legitimate bargaining position is to be determined by balancing, in each case, the motivation of the employer and the impact of those weapons on employee rights against the substantiality of the business justification shown by the employer.

See *National Labor Relations Board* v. *Great Dane Trailers,* 388 U.S. 26, 33-34; *Lane* v. *National Labor Relations Board,* 418 F. 2d 1208, 1211 (C.A. D.C.).

2. The Board's decision here constituted a proper application of this principle to the facts of this case. The Board found that the Company's lockout and use of temporary replacements were not motivated by union animus or by a purpose to restrain its employees in the exercise of Section 7 rights (Pet. App. A9, A11). It further found that the Company did not hire new employees to perform the work of the locked out employees, but merely used its own personnel who were not in the locked out unit; that the non-unit replacements were used only for the duration of the labor dispute; that the Company offered reinstatement to all regular unit employees when the lockout ended on June 7; and that all were immediately returned to work when the strike ended in October 1970.

In these circumstances, the Company's action had no significant impact on the unit employees' right to bargain collectively through their union representative. Indeed, the company's conduct actually resulted in the employees reaffirming their support for the Union, for the entire unit backed the Union's bargaining position throughout a four-month strike. Finally, the Company's action was supported by legitimate business considerations. Union negotiators expressly stated that a strike was likely as soon as the contract expired, and refused to grant the Company a one-week extension of the contract to enable it to service its glass customers. At least two of the Company's major glass customers gave notice that any interruption of deliveries would result in a search for a new supplier (Pet. App. A11; J.A. 114, 115, 111, 118, 136, 127, 137, 139-140).

The Board's holding is in accord with that of the Eighth Circuit in *Bookbinders Local No. 60* v. *National Labor Relations Board (Inter-Collegiate Press),* Nos. 72-1573 and 72-1749, decided October 25, 1973, 84 LRRM 2562, which involved a similar fact situation. And, the court below correctly held that the Board's findings and conclusions were supported by substantial evidence.

3. *Inland Truck Co.* v. *National Labor Relations Board,* 440 F. 2d 562 (C.A. 7), certiorari denied, 404 U.S. 858, relied upon by the Union, is distinguishable. There, the court sustained the Board's finding that the use of temporary replacements during an otherwise lawful lockout was a violation of Section 8(a)(1) and (3) of the Act. However, there, unlike here, the employer hired some new employees (179 NLRB 350, 352), and hence its action was more destructive of the bargaining rights of the locked-out employees.[4] Moreover, unlike here, there was no evidence of a bona fide business justification for the employer's action (*id.* at 359), and the union advised that it had no intention of striking and offered to give prior notice if it decided to do so (*id.* at 352).[5]

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[4] As the court emphasized in *Inland* (440 F. 2d at 564): "Employees [were] forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earnings opportunities over which the locked out employees were endeavoring to bargain."

[5] Although the court, in *Inland,* stated that "a lockout * * * accompanied by continued operation with replacement labor, is per se * * * an unfair labor practice under §158(a)(1)," that statement was qualified by the phrase "in the circumstances at bar" (440 F. 2d at 565).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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